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Supreme Court of the United States.

October Term, 1935.

No. 125

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, Trustee,
RESPONDENT.

Petition for Writ of Certiorari and Brief in Support of Petition.

FRANK H. PARDEE,
Attorney for Petitioner.

F. PAUL WELSCH,
EDWARD F. SMITH,
Of Counsel for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No.

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, TRUSTEE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Honorable Associate Judges thereof:

The petitioner, Palmer Clay Products Company, respectfully represents to this Honorable Court as follows:

1. On January 14, 1933, an involuntary petition in bankruptcy was filed against the Metropolitan Builders Supply Company, and Matthew Brown, the respondent herein, was duly elected trustee in bankruptcy of said company on February 28, 1933, and duly qualified.

2. A suit was brought in the State Court by the respondent to recover from the petitioner certain payments alleged to have been made by the bankrupt, Metropolitan Builders Supply Company, to the petitioner, which payments were alleged by the respondent to be preferences. The answer was a general denial.

3. At the trial of said suit it appeared that the petitioner was a secured creditor, having in its possession a written guarantee of a third party. There was no evidence introduced as to whether there were other secured creditors, nor as to what percentage of their claims could be paid to all creditors of the petitioner's class on the dates when the various payments were made. The payments hereinabove referred to were made as follows: November 25, 1932, $143.64, $4.79; December 6, 1932, $425.94; December 13, 1932, $654.91; December 29, 1932, $459.01. No evidence was introduced as to what the bankrupt could have paid to all creditors of the petitioner's class at the time of each payment, nor as to what dividends were paid to creditors generally. These facts, your petitioner feels, constitute all of the facts necessary for the determination of the questions raised.

4. At the close of the trial of said case, the petitioner filed certain requests for rulings of law. The trial judge denied request numbered 8, which was predicated upon the law as laid down by the United States District Courts for the Districts of Kansas and Arkansas, and by the United States Circuit Court of Appeals for the Eighth Circuit, (cases cited in supporting brief), and was as follows: "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received."

5. The trial judge refused to follow the law as laid down by said United States Courts and found for the respondent in the sum of One Thousand Six Hundred Eighty-eight Dollars and twenty-nine cents ($1,688.29), with interest from the date of the writ. In passing upon said request for ruling of law, the trial judge said: "Not a correct statement of the law. . . . Preference is determined as of the date of filing the petition."

The case was reported to the Appellate Division. The report was dismissed, and the petitioner appealed to the Supreme Judicial Court of Massachusetts.

6. The Supreme Judicial Court of Massachusetts, upon the appeal of this case, also refused to follow the rule laid down by the United States District Courts and United States Circuit Court of Appeals, stating in part as follows:

> "The question presented involves the construction of §60 a, b, of the bankruptcy act (Act of July 1, 1898, c. 541; 30 U.S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U.S. Sts. at Large, 799, c. 487, §13, and by Act of June 25, 1910, 36 U.S. Sts. at Large, 842, c. 412, §11). The defendant relies upon certain Federal cases which support its contentions. See *W. S. Peck & Co.* v. *Whitmer,* 231 Fed. Rep. 893; *Haas* v. *Sachs,* 68 Fed. Rep. (2nd) 623. The construction of §60 a, b, in these cases is directly contrary to that given by this court to the same section in *Rubenstein* v. *Lottow,* 223 Mass. 227. No decision of the Supreme Court of the United States interpreting this section in the present particular has been cited and none has been found. The case of *Rubenstein* v. *Lottow* is controlling. No occasion has been presented for overruling it. . . . In the absence of a contrary decision by the Supreme Court of the United States, it must be accepted as sound and determinative of the present case. . . . Unless and until the Supreme Court of the United States reaches a contrary conclusion, State courts are not precluded from exercising their own judgments upon questions involving Federal Statutes. . . . However, respectful consideration should be given to decisions of Federal circuit courts of appeal. The cases cited by the defendant have been examined. We realize that uniformity in the interpretation of the bankruptcy act is desirable. Nevertheless we are of opinion that the case of *Rubenstein* v. *Lottow*,

supra, should not be overruled. The construction of §60 a, b, of the act adopted by the Appellate Division in this case was warranted."

7. The authority under which the jurisdiction of this Honorable Court is invoked is by virtue of the provision of §344 of the Judicial Code. Also, because the Supreme Court of the United States has jurisdiction to review, in its discretion, by certiorari, proceedings involving bankruptcy questions in the courts of the states, as, for instance, where a State court has erroneously interpreted a provision in the bankruptcy law. It is the contention of the petitioner in this case that the Massachusetts State Courts have erroneously interpreted a provision in the bankruptcy law. The law on this is more fully covered in the petitioner's supporting brief.

8. The questions involved in this case as stated by the Supreme Judicial Court of Massachusetts in its decision are: *first,* whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy; *second,* what is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class: (a) what percentage creditors of the same class could have received at the date of the actual payment or transfer, or (b) what other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

9. The petitioner respectfully submits to this Honorable Court that its petition should be allowed for the following reasons:

(1) The questions involved in the case are questions of far-reaching importance to mercantile and business interests which have not been, but should be, settled conclusively by this Court.

(2) The said Massachusetts State Courts have decided an important question of federal law in a way directly in conflict with the weight of authority and the applicable decisions of this Court as to call for the exercise of this Court's power of supervision.

(3) The decision of said Massachusetts State Courts is in direct conflict with the decisions of the United States District Courts for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; in consequence it is desirable that the rule of law applicable be definitely and finally established by this Court.

Wherefore the petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, commanding said Court to certify and send to this Court a full and complete transcript of the record of all of the proceedings in this cause, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that it may have such other and further relief as to this Honorable Court may seem appropriate and in conformity with law.

FRANK H. PARDEE,
Attorney for Petitioner.

F. PAUL WELSCH,
EDWARD F. SMITH,
Of Counsel for Petitioner.

I hereby certify that I am counsel for the Petitioner herein, Palmer Clay Products Company; that in accordance with the request of said petitioner, the foregoing petition

has been prepared; and that the allegations contained in said petition are true to the best of my knowledge and belief; and that said petition is, in my opinion, well founded in law and in fact, and should be granted.

FRANK H. PARDEE.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss. BOSTON, MASSACHUSETTS

Then personally appeared Frank H. Pardee of Boston, Massachusetts, and made oath that he prepared and signed the foregoing petition and that the same is prepared with the consent of and in accordance with the request of the petitioner named therein, and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

EDWARD F. SMITH,

Notary Public.

My commission expires April 18, 1941.

Supreme Court of the United States.

OCTOBER TERM, 1935.

No.

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, TRUSTEE,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

The facts and proceedings in this case are shown in full in the record and described, we believe, in sufficient detail in the petition (Pet. pars. 1 to 6, incl.).

The controversy has reference to the correct interpretation of §60 a, b, of the United States Bankruptcy Act.

Jurisdiction.

The authority under which the jurisdiction of this Honorable Court is invoked is by virtue of the provision of §344 of the Judicial Code. Gilbert's Collier on Bankruptcy (3rd Ed.) states in substance at pp. 559, 560: The bankruptcy law contains no provisions regulating the review by the Supreme Court of the United States of decisions in bankruptcy matters of the courts of last resort in a state. But the right to such review, as given generally, applies

likewise to review of bankruptcy matters. *Van Huffel* v. *Harkelrode,* 284 U.S. 225. . . . The Supreme Court has jurisdiction to review in its discretion, by certiorari, decisions of the highest court of a State in proceedings involving bankruptcy questions in the courts of the State, as, for instance, where a state court has erroneously interpreted a provision in the bankruptcy law. *Hill* v. *Harding,* 107 U.S. 631; *Williams* v. *Heard,* 140 U.S. 529; *Eau Claire Nat'l. Bank* v. *Jackman,* 204 U.S. 522.

Statement of the Question at Issue.

The specific questions, therefore, which the petitioner respectfully submits for the decision of this Honorable Court, in the light of conflicting interpretations by a State court and United States District and Circuit Courts of Appeal of §60 a, b, of the United States Bankruptcy Act, may be stated as follows:

(1) Whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy.

(2) What is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class:

(a) What percentage creditors of the same class could have received at the date of the actual payment or transfer, or

(b) What other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

(3) Whether or not the Massachusetts State Courts acted erroneously in refusing the petitioner's request for ruling of law, which was as follows:

"The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received."

The Grounds for the Petition for Certiorari.

The grounds upon which the petitioner appeals to this Honorable Court for a writ of certiorari to the said Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, are as stated in the petition, and are as follows:

SUMMARY OF ARGUMENT

I. The questions involved in this case are questions of far-reaching importance to mercantile and business interests which have not been, but should be, settled conclusively by this Court.

II. The Massachusetts State Courts have erroneously interpreted a provision in the United States Bankruptcy Act and have laid down a doctrine which is untenable and in conflict with the weight of authority and the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision.

III. The decision of said Massachusetts State Courts is in direct conflict with the decisions of the United States District Courts for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; in consequence it is desirable that the rule of law applicable be definitely and finally established by this Court.

Argument.

Point 1.

The questions involved in this case are questions of far-reaching importance to mercantile and business interests which have not been, but should be, settled conclusively by this Court.

First. The determination of the questions involved in this case affect the entire business and mercantile world. It is common knowledge that most businesses are conducted on a credit basis. Therefore, unless the principles of law involved in this case are definitely and finally established by this Court, business concerns will be left in utter confusion, not knowing whether appellate courts in their respective states will follow the interpretation of the bankruptcy section involved in this case in the manner determined by the United States District and Circuit Courts of Appeal, or by the Massachusetts State Courts. It is imperative that the future creditors of businesses, whether such businesses are operated by corporations or by individuals, who are in the eyes of the Bankruptcy Act prospective bankrupts, should know what their rights might be in situations similar to the one at hand.

Therefore, your petitioner respectfully submits to this Honorable Court that the questions involved are of great importance to mercantile and business interests, and they have not been, but should be, settled conclusively by this Court.

Point 2.

The Massachusetts State Courts have erroneously interpreted a provision in the United States Bankruptcy Act and have laid down a doctrine which is untenable and in conflict with the weight of authority and the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision.

First. The Supreme Judicial Court of Massachusetts decided in *Rubenstein* v. *Lottow,* 223 Mass. 227, that the preferential character of a transfer of property is to be determined as of the date of the filing of the petition in bankruptcy, and in the instant case said Court refused to overrule its previous decision despite the fact that subsequent to *Rubenstein* v. *Lottow, supra,* the United States District Courts for the Districts of Kansas and Arkansas and the United States Circuit Court of Appeals for the Eighth Circuit rejected the interpretation in *Rubenstein* v. *Lottow* of §60 a, b, of the United States Bankruptcy Act, and decided in substance that the preferential character of a transfer of property "*is to be determined as of the date of the actual transfer, and not as of some future date, when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses.*" *W. S. Peck & Co.* v. *Whitmer,* (C.C.A. 8) 231 Fed. 893, 897; *Mansfield Lumber Co.* v. *Sternberg,* (C.C.A. 8) 38 Fed. (2d) 614, 617; *Haas* v. *Sachs,* (C.C.A. 8) 24 Am. B. R. (N.S.) 388.

Second. Gilbert's Collier on Bankruptcy (2d Ed.) at p. 94, in stating the weight of authority on the question involved in this case, said as follows: "*By the language of §60 a, b, of the Bankruptcy Act, a payment must operate as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not, must be of the time it is made.*"

As was said *In re Gaylord,* 225 Fed. 234 (U.S.D.C.N.Y.), at p. 238: " . . . So the intent of the person taking the security or receiving the transfer is immaterial, provided he *then* had reasonable cause to believe the taking and enforcement thereof would enable him to obtain a greater percentage of his debt than would other creditors of the same class *then existing.* . . ."

Point 3.

The decision of said Massachusetts State Courts is in direct conflict with the decisions of the United States District Courts for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; in consequence it is desirable that the rule of law applicable be definitely and finally established by this Court.

First. In the case of *W. S. Peck & Co.* v. *Whitmer,* (C. C.A. 8) 36 Am. B. R. 722, 231 Fed. 893, we find a United States Circuit of Appeals deciding the federal question involved in this case squarely against the decision in *Rubenstein* v. *Lottow,* 223 Mass. 227. In that case, the United States Circuit Court of Appeals, speaking through Garland, Cir. J., said at page 897:

> "Let us assume that the record shows that the bankrupt was insolvent at the time the several payments were made, and that appellants had knowledge of such facts, which if investigated would have led to a knowledge of the insolvency, there would still remain to be established two important and material facts, viz., that the payments *at the time they were made to appellants enabled them to receive a larger percentage of their respective debts than any other creditor of the same class,* and that *at the time each particular payment was made* appellants had reasonable cause to believe that the payments would have this effect. We fail to find any evidence in the record that the appellants *at the time* they received the several payments had reasonable cause to believe that the enforcement thereof would effect a preference.
>
> " . . . In view of these undisputed facts, how can it be said that the appellants at the time they received the payments had *then* reasonable cause to believe that the enforcement of the transfer would effect a preference; that is, *that it would result then and there if the*

estate of the bankrupt was distributed, in the appellants receiving a larger percentage of their debt than other creditors of the same class?"

(At p. 898). . . . "The estate of the bankrupt at the time the payments were made, would have paid about 60 per cent on the dollar. The creditor who receives a partial payment on his debt, so far as the question of his having reasonable cause to believe that the enforcement of the payment would effect a preference is concerned, *has the right to look at the bankrupt's estate at the time the payment is made, bankruptcy may never occur; but if it does, the creditor may not be charged with a knowledge of what an estate will pay out after it has undergone the shrinking process of the court.*

"We are therefore of the opinion that the trustee did not sustain the burden of proof in establishing that *at the time the payments were made* they operated as preferences, and that *at the time they were made* the appellants had reasonable cause to believe that the enforcement of the payment would effect a preference."

And on the heels of *Peck & Co.* v. *Whitmer, supra,* followed *Haas* v. *Sachs,* 68 Fed. (2nd) 623. Here again the United States Circuit Court of Appeals for the Eighth Circuit, as late as December 28, 1933, citing with approval *Peck* v. *Whitmer, supra,* stated through Gardner, Cir. J. at p. 625:

"If enough assets remain after a transfer to one creditor to give other creditors in the same class as great or greater percentage of their claims, then no voidable preference results. *W. S. Peck & Co.* v. *Whitmer,* (C.C.A. 8) 231 F. 893, 897; *Mansfield Lumber Co.* v. *Sternberg,* (C.C.A. 8) 38 F. (2nd) 614, 617.

"This court has held that whether the effect of the transfer will be to enable the creditor receiving it to

obtain a greater percentage of his claim than other creditors of the same class, *is to be determined as of the date of the actual transfer, and not as of some future date when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses.* In considering this question, Judge Garland, speaking for this court in *W. S. Peck & Co.* v. *Whitmer, supra,* among other things, said:

'It is argued that the words "will be" refer to some future period, presumably to the time when after the payment of all expenses, a bankrupt's estate is ready for distribution by a court of bankruptcy. We are of the opinion, however, that by the very language of Section 60 b (11 U.S.C.A. Sec. 96 b) *the payment must operate as a preference at the time it is made, or not at all,* and the belief of the creditor as to whether it will constitute a preference or not, must be of the time the payment is made.

'Taking the record as it stands, how could the appellants be held to have believed that *if the estate of the bankrupt had been distributed at the time of these payments it would not have given every creditor a greater percentage of their debts than they were receiving.*'

"The doctrine of the *Peck* Case was reaffirmed by this court in an opinion by Judge Booth in *Mansfield Lumber Co.* v. *Sternberg, supra,* where it is said:

'It is manifest that, if all creditors of the same class were to receive the same percentage on their debts, there would be no preference. Remington on Bankruptcy (3d Ed.) Sec. 1807. *Or, if enough assets were left after a transfer to one creditor to give to other creditors in the same class an equal or greater percentage of their debts, there was no preference.*' "

Therefore, it is respectfully submitted that the conflict between the decisions of the Massachusetts State Courts and the United States District Courts for the Districts of Kansas and Arkansas and the United States Circuit Court of Appeals for the Eighth Circuit upon the identical questions of law is apparent; and the Supreme Court of the United States, never having had occasion to settle the question, should now settle it definitely and finally.

Conclusion.

It is most respectfully submitted to this Honorable Court that the questions involved in this case are of great importance in the administration of the Bankruptcy Act and of great importance to the mercantile and business interests; that there is conflict between the Massachusetts State Courts and the District Courts of the United States for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; that the Massachusetts State Courts have erroneously interpreted a provision in the United States Bankruptcy Act, and have laid down a doctrine which is untenable, and in conflict with the weight of authority and the applicable decisions of this Court as to call for the exercise of this Court's power of supervision; that especially in view of the fact that the Massachusetts State Courts have by the substance of their decision openly invited a definite and final ruling on this question in their statement that "in the absence of a contrary decision by the Supreme Court of the United States it, (*Rubenstein* v. *Lottow*), must be accepted as sound and determinative of the present case. . . . Unless and until the Supreme Court of the United States reaches a contrary conclusion. . . .;" and for all other reasons above pointed out, it is respectfully submitted that the writ of certiorari

should issue; that the judgment of the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, should be reversed.

Respectfully submitted,

FRANK H. PARDEE,
Attorney for Petitioner.

F. PAUL WELSCH,
EDWARD F. SMITH,
Of Counsel for Petitioner.